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New Governance Anxieties: A Deweyan Response

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Recommended Citation

William H. Simon, *New Governance Anxieties: A Deweyan Response*, 2010 *Wis. L. Rev.* 727 (2010).

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WISCONSIN LAW REVIEW SYMPOSIUM AFTERWORD

PART II: NEW GOVERNANCE ANXIETIES: A DEWEYAN RESPONSE

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INTRODUCTION

Most participants in the Symposium on *New Governance and the Transformation of Law* found the “new governance” phenomenon attractive and important, but as David and Louise Trubek note, they were not entirely comfortable with it.¹

One anxiety concerned the difficulty of defining the phenomenon and situating it in the universe of familiar political ideas and institutions. The term gets applied to a variety of institutions. To some people, these institutions do not fit snugly into any familiar political categories. To others, they bear a suspicious resemblance to categories that no longer inspire optimism—for example, Romantic communitarianism, corporatism, or “new public management.”

The other prominent anxiety concerned the relation of new governance regimes to liberal values of justice and democracy. To some, new governance seems to depend on deferring or compromising such values and, in doing so, to put vulnerable people at risk.

In order to address these anxieties, we have to decide whether the conditions that give rise to them should be counted as evidence against new governance or as defective implementations of it. Do the criticisms imply rejection of new governance in general, or do they favor an improved version of it?

If our goal is to contribute to improved practice, we should adopt the interpretation that makes new governance as good as it can be. I think the most promising interpretation is the Democratic

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1. David & Louise Trubek, *The World Turned Upside Down: Reflections on New Governance and the Transformation of Law*, 2010 WIS. L. REV. 719.

Experimentalist one inspired by John Dewey. Dewey thought of democracy as a process of collaborative discovery, rather than a process controlled by the determinate will of the citizenry.² He thought of the citizenry not as a unitary public, but as multiple publics defined by their relations to different problems and held together by an overlapping consensus. He called for government to treat public policies as “experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences.”³ In such a polity, the most salient forms of accountability do not involve showing that official conduct conforms to some previously enacted mandate, but demonstration and transparent explanation and assessment of conduct in the light of general public aims.

Most of the new governance anxieties seem to arise from departures from this Deweyan framework rather than instantiations of it. In support of this claim, I will discuss, first, the background conditions of new governance, and then the relation of new governance to both justice and democracy.

A. Background Preconditions

For what kind of problems or circumstances is new governance most promising? At the conference, Robert Ahdieh associated new governance with a strong convergence of interests.⁴ Edwin Rubin associated it with dispositions toward solidarity or honor.⁵ Gráinne de Búrca associated it with circumstances of extreme urgency.⁶

While all these factors may be favorable to the successful use of new governance, the Deweyan view suggests that the most important considerations are interdependence and uncertainty.

Interdependence means that people share the effects of a common problem or that their collaboration is necessary to remedy it. The primary unit of public activity in the Deweyan polity is a (not *the*)

2. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (1946).

3. *Id.* at 203.

4. Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State* (Emory Univ. Sch. of Law, Emory Pub. Law Research Paper No. 09-86, Emory Law & Econ. Research Paper No. 09-50, 2009), available at <http://ssrn.com/abstract=1522127>.

5. Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535.

6. Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227.

public, and a public is constituted by the relation of its members to a practical problem.⁷

Uncertainty means that the members cannot, either individually or collectively, determine with confidence what the appropriate response to the problem is prior to intervening. Uncertainty takes one or more of three forms. The public or its representatives do not know what the best immediate intervention is. They fear that the circumstances will change quickly enough that the currently effective intervention will become obsolete before it can be centrally recalibrated. Or effective intervention depends so much on local circumstances that it must be customized. In these conditions, the capacity of new governance for drawing on stakeholder knowledge—both for continuous adaptation and for contextualization—is especially attractive.

New governance depends on some level of voluntary cooperation, but it is a little misleading to see the viability of its projects simply as a function of the degree of shared interests. In order to cooperate voluntarily, stakeholders must expect gains from the collaboration. But if the gains are large enough, they can compensate for losses. Thus, interests do not need to be entirely convergent, and in some areas of apparent new governance success (for example, schools in Kentucky and New York City and endangered species preservation in various places), stakeholders with substantial conflicting interests have collaborated effectively.

Moreover, the relevant interests are not necessarily exogenous to the intervention. The regime itself may induce people to collaborate by changing their background alternatives. Land developers found an interest in collaborating with environmentalists to create Habitat Conservation Plans, but only after the Endangered Species Act precluded them from developing in the absence of such plans.⁸ And of course, people's perceptions of their interests are susceptible to change in the course of deliberation.

We tend to alternate between hierarchical and horizontal perspectives in talking about new governance. From the hierarchical perspective, we think of a government with authority to impose a solution but which, because of uncertainty, finds that it must employ a regime that induces and enables local actors to derive one. Alternatively, we can think of the situation horizontally—say from the point of view of a group of peers (individuals, firms, states) who want

7. DEWEY, *supra* note 2, at 3–36. Gráinne de Búrca also emphasized interdependence. See de Búrca, *supra* note 6.

8. Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in *NEW GOVERNANCE IN THE EU AND THE US* 293, 301–04 (Gráinne de Búrca & Joanne Scott eds., 2006).

to commit themselves to joint action but, because of uncertainty, cannot contractually specify their mutual obligations and must thus set up a regime for ongoing adaptation.

In practice, the distinction between these two situations blurs. In the hierarchical situation, the government may wind up deferring to or supporting a peer organization such as the Institute of Nuclear Power Operations.⁹ In the horizontal situation, the peers may contract with or create an encompassing organization to implement and enforce its norms—for example, the Leafy Green Marketing Agreement regime that enforces food safety norms in California¹⁰ or the Inter-American Tropical Tuna Commission that regulates tuna fishing practices that threaten dolphins.¹¹

So the distinction between the hierarchical and horizontal perspective may be largely formal. A distinction with more practical significance concerns the degree of freedom that the designers of the regime have in revising background norms. In designing the Endangered Species Act, the U.S. Congress could change the default rule (from freedom to develop to prohibition of development) in a way that substantially redistributes power. In other contexts—international trade regimes may be examples—the default rules are likely to remain unchanged. That does not necessarily mean that weaker parties cannot gain from collaboration or that the outcomes of deliberation will be simple functions of default power. But it does limit the options of the designers.

Understood in this way, new governance regimes do not resemble Romantic communitarianism, corporatism, or new public management. Unlike communitarianism, they can accommodate a good deal of conflict of interests. Unlike corporatism, they do not treat groups or group interests as fixed, and they do not create a rigid monopolistic structure of group representation. And unlike new public management, they deny that, in the situations they address, performance goals and metrics can be specified hierarchically without ongoing stakeholder participation or that performance-based incentives are sufficient for success without more direct efforts to facilitate learning.

9. See generally JOSEPH V. REES, *HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY AFTER THREE-MILE ISLAND* (1994).

10. See generally CAL. DEP'T OF FOOD & AGRIC., CALIFORNIA LEAFY GREEN PRODUCTS HANDLER MARKETING AGREEMENT (2008), available at <http://www.caleafygreens.ca.gov/members/resources.asp> (select "LGMA Marketing Agreement").

11. See Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L EVNTL. L. REV. 1 (1999).

B. Justice

New governance is a form of proceduralism. The legitimacy of the solutions that emerge from its deliberations is a function of basic background constraints—eligibility norms for participation, rules of deliberative process, and default rules that dictate what happens in the absence of agreement. These norms have to meet some test of fairness.

But assuming fair constraints of this sort, the legitimacy of the solution the deliberations produce rests mainly on the agreement of the deliberators. The basic uncertainty condition for invoking new governance means that we have no more specific criteria for assessing the legitimacy of the specific solution.

It could be argued that this fact precludes the use of new governance to address issues that implicate issues of justice. If true, this would be a very damaging claim, since justice concerns are integral to key positions on many pressing social problems. Even the issues involving coordination standards of the sort Robert Ahdieh focuses on can implicate questions of justice. For example, agricultural grading standards are the kind of norms that one usually thinks of as coordination signals, but small farmers argue passionately that the U.S. Department of Agriculture's rules for designating food as "organic" favor big agribusiness at their expense.¹² And justice claims are prominent in the social policy areas such as environment, health, safety, education, and discrimination where new governance is commonly applied.

There are at least two versions of the claim that new governance is contraindicated where issues of justice have not been settled. First, it is sometimes claimed that, as a matter of fact, people cannot make deliberative progress—that is, cannot arrive at productive agreements—with respect to such issues. It seems far too soon to arrive at such a conclusion on the basis of current evidence. The evidence is mixed, but there are surely enough examples of apparent deliberative success to demand that the question be treated as open. Questions of distributive fairness are central, for example, to the widely admired "participatory budgeting" regime in several Brazilian municipalities.¹³ Although his projects do not involve direct governance, James Fishkin has

12. Brian Chasnoff, *What's in a Word? Small Farmers Say USDA Has Stolen the Word "Organic,"* SAN ANTONIO CURRENT, May 26, 2005.

13. LEONARDO AVRITZER, PARTICIPATORY INSTITUTIONS IN DEMOCRATIC BRAZIL 83–115 (2009).

demonstrated systematically the possibility of deliberative progress over a broad range of issues freighted with fairness concerns.¹⁴

Another version of the claim is that new governance sometimes treats issues as uncertain—and hence a *subject* for deliberation—when in fact they ought to be treated as certain, and hence a *constraint* on deliberation. Some issues need to be regarded as part of the settled framework of deliberation. No one should be asked to deliberate about whether they are entitled to basic civility or whether certain types of discrimination against them are permissible.

But this second type of critique should be pursued retail rather than wholesale. The argument should show that the answer is so powerfully apparent or so generally accepted that it does not belong on the deliberative agenda.

Lisa Alexander's discussion of public-housing replacement is a good example.¹⁵ She criticizes the deliberative process because it left open the extent to which displaced residents would have priority on replacement units and the outcome fell considerably short of the right of return she favors.¹⁶ Her position requires her to defend the idea of a right of return normatively as an entitlement that can be established and defined without the need for the kind of contextualization and adaptability that calls for new governance deliberation.

If she is right, her argument points to an important condition for the design of the deliberative process she analyzes. However, I do not think the failure to observe this condition in the case she studied indicates a general disadvantage of new governance. The danger that matters that should be treated as settled constraints will be mis-assigned to the deliberative agenda seems no greater than the danger that issues that should be submitted to deliberation will be imposed as constraints. Think, for example, of the critiques of the categorical application of constitutional search-and-seizure norms in the public-housing context in a way that some feel were insensitive to the practical problems of crime control in this context.

Lisa Alexander and Amy Cohen quote me as saying that Experimentalist deliberation tends to “bracket” distributive issues.¹⁷ I did say this, but it is wrong, or at least misleading. First, it conflates

14. JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* 106–96 (2009).

15. This discussion appeared in a previously published article presented at the Symposium. Lisa Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 16 *GEO. J. ON POVERTY L. & POL'Y* 117 (2009).

16. See generally *id.*

17. *Id.* at 133; Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 *WIS. L. REV.* 357.

two different questions. One is the question just mentioned of which issues will be treated as settled constraints and which ones will be treated as subjects for deliberation. The other is the question of how, within the deliberative process, intractable disagreement will be handled.

At the process design level, some issues have to be designated as settled, but as I have suggested, I do not think that this category of issues is usefully described in terms of justice or distributive fairness.

Within the deliberative process, a basic technique is to put aside (“bracket”) the most intractable issues and focus on matters where more common ground appears. The hope is that progress can be made without fully addressing the hard issues, or that discussion of the other issues will lead to a reframing of the hard ones in ways that will make them more tractable. Think, for example, the progress that occurred in discussions of the death penalty when discussion was diverted away from issues the ultimate legitimacy of state killing toward a discussion of the reliability of the process of guilt determination. But this kind of bracketing does not have to permanently preempt discussion. Moreover, I do not think that the issues that get bracketed in this way are especially likely to be distributive ones.

A final point needs to be made to put these matters in perspective. Which issues seem settled and which seem open for deliberation may vary depending on what part of the system we are in. Experimentalists often think of institutions as nested hierarchies, with deliberative processes going on at each level. Deliberation at any given level can provisionally settle an issue and take it off the agenda for the levels below, but they can remain matters for deliberation at higher levels. In a federal state, issues may be considered settled within a member state that are matters for deliberation at the federal level, and issues considered settled at the federal level may be open within international regimes. For example, the permissibility of expansive prohibition of “hate speech” seems fairly settled within Germany and the United States, but in different ways. At least within these countries, it might be plausible to treat the issues as settled for some purposes in stakeholder regimes, for example, in community policing. Clearly, however, the issues could not be treated as settled within an international human rights regime that both countries participated in.

So when a critic asserts that that a particular fairness precept like the right of return of displaced public-housing residents should be treated as a constraint, the plausibility of her argument may depend on what level she is discussing. It might be that such a right is particularly well-supported in a particular locality given its experiences or needs or culture but less so at the national, and still less at the global, level.

C. Democracy

Those—including in this conference, Mark Dawson—who associate new governance with a “managerialism” characterized by expert domination, decision-making behind-closed-doors, and Balkanization among technical fields are not adopting the interpretation that makes new governance as good as it can be.¹⁸

On the Deweyan interpretation, new governance is committed to decision-making by diverse and encompassing stakeholder groups and to transparency. Dewey argued vigorously that expertise would be ineffective without the kind of street-level local knowledge that only lay stakeholders could provide and insisted that democracy required a kind of expertise that would develop technical and empirical knowledge in forms accessible to lay deliberators.¹⁹ James Fishkin has developed a model for this kind of expertise, and it has performed impressively in various “deliberative polling” events.²⁰

Moreover, in a manner Dewey foresaw, much recent Experimentalist practice undermines traditional claims of expertise by defining the qualifications of professional participants more in terms of experience with problems than in terms credentials in intellectual disciplines. For example, the Association of Drug Court Professionals, whose members play an important role in court-annexed drug-treatment regimes, includes lawyers, social workers, doctors, nurses, and psychologists.²¹ In social-service practice, decisions are increasingly made, not by a particular professional, but by interdisciplinary teams. Even without lay stakeholders, the need to explain a position in such a cognitively diverse group diminishes the ability to appeal for deference to credentials or professional position.

The critics are correct that “informalization” presents obstacles to democratic accountability. If decisions rest on tacit, ineffable considerations, it is much harder to assess them. But in associating new governance with informalization, the critics ignore a major innovation that cuts across the most promising new governance reforms. These reforms reject the hierarchy and rigidity associated with formalization, but they also reject the kind of tacit, low-visibility decision-making implied by informalization. The most promising new governance reforms insist that both particular decisions and general norms be as

18. Mark Dawson, *Transforming Into What? New Governance in the EU and the “Managerial Sensibility” in Modern Law*, 2010 WIS. L. REV. 389.

19. DEWEY, *supra* note 2, at 123–28, 148–71.

20. FISHKIN, *supra* note 14, at 106–58.

21. Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 859 (2000).

explicit as possible. They, in fact, adopt a kind of formalization, though its role is different from the one it plays in traditional liberal theory. The role of formalization in traditional liberal theory is to constrain decision-making to terms laid down authoritatively in the past. The role of formalization in new governance is to make practice transparent.

Thus, in new governance, rules do not constrain when following them would not serve their underlying purposes. But any departure from the rules triggers some accountability process—as they say in the EU, “comply or explain.” Ideally, if the rule departure is sustained, the rules get rewritten immediately. This kind of formalization avoids the twin dangers of traditional formalization—the tendencies on the one hand to constrain decisions in unforeseen and counterproductive ways and on the other to mask low-visibility rule departures that superiors must tolerate either because they lack the resources to detect them or because the system would collapse if the rules were consistently enforced.

The suspicion that new governance compromises democracy seems to arise from a traditional but debatable conception of democracy. Tradition identifies democracy with fidelity to the will of a unitary public expressed through elected representatives in terms of rules faithfully implemented by administrative and judicial officials. As new governance critics would probably be the first to point out themselves in other moods, this idea has serious limitations. For one thing, the “people” assert their will only in a crude and ambiguous form in representative elections, where candidates are only vaguely associated with issues and issues are massively bundled. For another, this structure exempts from accountability a vast range of government action. Locke made this clear from the beginning in designating most of what we think of as executive action “prerogative.”²²

The range of executive action, of course, has been vastly extended with the modern growth of the administrative state. Modern administrative law has adapted by attempting to provide quasi-legislative accountability for administrative rulemaking and extending rights to quasi-judicial and judicial hearing to an expanded range of citizen interests. But as Michael Wilkinson notes, a vast range of administrative action is either explicitly or effectively immune from any form of legal accountability.²³ Administrative law is basically “Schmittian” with respect to the national security state—it explicitly exempts most relevant executive action from conventional legal

22. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 393 (Peter Laslett ed., 1960) (1689).

23. Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673.

accountability.²⁴ Government decisions *not* to enforce law in the criminal, civil, and regulatory spheres or *not* to intervene to protect vulnerable people are extremely difficult to challenge. And even with many decisions that are formally subject to hearing rights, the rights often have little practical use to citizens who lack the knowledge and resources to make use of them. A key problem here is that the core mechanisms of accountability in traditional liberalism—rulemaking proceedings and trial-type hearings triggered by individuals—are neither available nor appropriate for much of what the modern state does.

Those who value democracy should thus be grateful that new governance has made available new modes of accountability that are feasible across an extended range of government activity, including the part previously exempt. The new governance demand on administrators to articulately and transparently explain and justify their conduct and submit to various forms of performance measurement and peer review can be applied in areas where the need for executive discretion has been thought to require immunity and it can be applied to conduct of public importance that does not take the form of rulemaking and may not trigger individual hearing rights.

Such demands potentially enhance accountability in two ways. First, to the extent that the process succeeds in meaningfully involving interested stakeholders, it affords a richer and more effective form of democratic participation on the relevant issues than is possible through voting in general elections. Second, the processes of transparent self-assessment and peer review leverage judicial and legislative accountability. They make administrative practice transparent to the legislature and the courts in a way that the traditional regime of rigid and erratically enforced formal rules could not.

24. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).